

REPORT

OF THE

ROYAL COMMISSION

IN RE

THE TOBACCO TRADE OF CANADA

PRINTED BY ORDER OF PARLIAMENT



OTTAWA

PRINTED BY S. E. DAWSON, PRINTER TO THE KING'S MOST
EXCELLENT MAJESTY

1903

REPORT OF THE COMMISSIONER

To His Excellency the Governor General in Council :

The undersigned, having been appointed by a Special Commission issued on the 3rd day of May, 1902, under the authority of an Order in Council approved by His Excellency on the same date, and by virtue of the provisions of Chap. 114 of the Revised Statutes of Canada, a Commissioner to inquire into and report to His Excellency the Governor General in Council concerning an alleged exclusive contract system adopted by the American Tobacco Company of Canada, Limited, and The Empire Tobacco Company, Limited; the object and effect of which is alleged to be to prevent those who deal in the class of goods made and supplied by these companies from selling the goods of other manufacturers, thus creating a monopoly, which seriously affects the interests, not only of the other manufacturers, but also of the growers of tobacco, has the honour to report as follows :—

A very full investigation was held in the cities of Windsor, London, Hamilton and Toronto, in the province of Ontario; in the cities of Quebec and Montreal, and the town of Joliette, in the province of Quebec; and in the city of St. John, in the province of New Brunswick.

During the course of the inquiry, the Commissioner had the valuable assistance of eminent counsel, namely : Hon. Mr. Dandurand, K.C.; Mr. Goldstein, advocate, of Montreal, and Mr. O. E. Fleming, barrister of Windsor, Ontario, representing the petitioners ; and the Hon. Mr. Béique, K.C., and Mr. C. S. Campbell, K.C., of Montreal, representing the American Tobacco Company of Canada, Limited, and the Empire Tobacco Company, Limited.

The Commissioner transmits with this report the whole record, including the depositions taken in shorthand of one hundred and nineteen witnesses (102 of whom were called on behalf of the petitioners, and 17 on behalf of the companies) ; the documents filed as exhibits in the course of the inquiry ; and the arguments of the learned counsel.

The investigation was directed to the following subjects of inquiry : (1) As to the existence of the alleged exclusive contracts, and the extent to which these contracts are in force; and (2) as to the effect of such contracts on the tobacco trade of Canada; with reference :—

(a) To the growers of Canadian tobacco:

(b) To the manufacturers of tobacco from Canadian leaf or from a combination of Canadian and foreign leaf.

The manufacture of Canadian leaf tobacco has increased rapidly in recent years. Within the past six years factories for the manufacture of tobacco made from Canadian leaf have been started in Ontario and Quebec, capital has been invested in this industry, the culture of leaf tobacco has been developed, and as a consequence of this enterprise, tobacco made from Canadian leaf has been to some extent substituted for the tobacco made from foreign leaf. In 1897 there was manufactured in Canada, from Canadian leaf 690,141 pounds, and none from combination leaf. In 1898 there was manufactured from Canadian leaf 1,949,429 pounds, and none from combination leaf; and in 1901 there was manufactured from Canadian leaf 3,041,687 pounds, and 1,224,411 pounds of combination leaf. This would show that the tobacco industry in Canada, both from the point of view of the grower of the leaf and the manufacturer of the Canadian leaf, is an industry of increasing importance.

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The culture of tobacco leaf in Canada is confined to two districts, widely separated geographically, and the conditions surrounding the growth and cure of the leaf differ greatly in these districts. In the district comprising the counties of Essex and Kent a tobacco known as White Burley leaf is grown, and this is used almost exclusively in the manufacture of plug chewing tobacco. The other tobacco-growing district is in the neighbourhood of Joliette, in the province of Quebec, and there is grown there a variety of leaf which is used almost exclusively in the manufacture of smoking tobacco. The farmers in Essex and Kent sell their tobacco leaf direct to the manufacturer or to his agent, and they have always a ready market for their product. The manufacturer is interested in getting the farmer to produce the very best quality of leaf tobacco, and he encourages the farmer to follow scientific methods in its growth and cure.

In the province of Quebec the farmer as a rule sells his tobacco to a middleman, who retails it to the manufacturer, and the surplus stock not used by the licensed manufacturer is sold in the public market or direct to the individual consumer. Under this system there is no inducement held out to the farmer to grow and cure his crop of tobacco leaf according to what are known in the trade as modern methods. Quite a percentage of the tobacco leaf grown in the province of Quebec under this system contributes nothing to the revenue of the country. All the parties engaged in the manufacture of tobacco who appeared before the Commission were agreed that the system followed in Quebec province injuriously affects the tobacco trade generally ; but as this is not a matter coming within the scope of the inquiry, your Commission does not deem it proper to make any finding or to offer any suggestion.

The inquiry resolved itself into two branches ; one having reference to the manufacture of cigarettes in Canada, and the other having reference to the manufacture of Canadian leaf tobacco in Canada.

The evidence adduced before the Commission disclosed that in the month of September, 1895, the American Tobacco Company of Canada was incorporated by Letters Patent, and acquired from the manufacturers then in the business their interest in the manufacture of certain brands of cigarettes which were at that time practically the only cigarettes manufactured in Canada and which were so much in demand that they might be regarded as a staple article in the trade. Shortly after their incorporation, and about the first day of November, 1895, the agreement which is complained of in reference to the sale of cigarettes was first introduced by the American Tobacco Company of Canada. It is in the following terms :—

THE AMERICAN TOBACCO COMPANY OF CANADA (LIMITED.)

43 to 49 Cote Street,

MONTREAL, November 1, 1895.

We will be glad to consign to you for sale, on commission, our various brands of cigarettes, such cigarettes to be sent by us, and received, sold and accounted for by you, upon terms and conditions as follows. namely :—

First.—All cigarettes which we may send to you, you are to sell to the retail trade only for retail purposes ; you are to sell none to other than to retail dealers, except by our written permission.

Second.—You shall, at all times, sell our cigarettes at such prices only as we may fix in selling lists sent to you. You shall not sell, or dispose of, any cigarettes at lower prices than those so fixed.

Third.—You are to guarantee all sales made by you. An extra compensation of two per cent (2 p. c.) will be allowed, and can be deducted by you, on all advances made upon consignments which are remitted to us within ten days after the date of shipment to you.

Fourth.—All cigarettes consigned to you are to remain our property until sold by you, subject only to your lien thereon for all advances which you have made under the terms of this agreement.

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Fifth.—The cost of freight from our factories is to be paid by you.

Sixth.—You are to guarantee us against loss by fire or otherwise, of any cigarettes consigned to you, and you are to either return to us the cigarettes in good condition or the price of the same as fixed on our selling lists as above mentioned. You are also to pay all charges and other expenses of every nature connected with the storing, keeping and selling of cigarettes which we may consign to you, or for your account, after the delivery thereof by us to the common carrier, including all provincial, county and municipal taxes and license fees.

Seventh.—If you do not discriminate against our cigarettes in favour of those of other manufacture, and if you do not sell, or dispose of, any of our cigarettes at less than the list price, and if, in all respects, you comply with the terms of this agreement, we will pay you a commission of two per cent (2 p.c.) on the amount realized by you from the sale of the cigarettes which we may consign to you.

Eighth.—If, however, you handle cigarettes of our manufacture exclusively, and do not sell or distribute, or in any way aid in the sale or disposition of, cigarettes of other manufacture, and if you, in all respects, fully comply with the terms and conditions of this agreement, we will pay you an additional commission of six per cent (6 %) on the amount realized by you from the sale of cigarettes which we may consign to you.

Ninth.—Settlements and payments of commissions are to be made as follows :—On May 1, 1896, or as soon thereafter as practicable, on all cigarettes consigned by us to you from the date of your signing this contract to February 1, 1896, which have been sold by you and settled for prior to May 1, 1896.

On August 1, 1896, or as soon thereafter as practicable, on all cigarettes consigned by us to you during the three months ending May 1, 1896, which have been sold by you and settled for prior to August 1, 1896, and so on, from quarter to quarter thereafter, in the same manner, for the subsequent consignments, sales and payments.

Tenth.—All obligation on our part to pay you any commission for the sale of the cigarettes which we may consign to you is, and shall be, dependent upon your strict compliance with the agreement hereinbefore contained, and that you will not sell any of our cigarettes for a less price than that fixed in our selling lists sent to you. If you should sell, or dispose of, any of our cigarettes at less than such price, you shall forfeit all right to the payment of any commissions on cigarettes which you may have previously sold, and on which commissions have not been paid you, and you shall at once, on demand, pay to us the list price for all cigarettes which you have sold, and deliver to us all our cigarettes then in your possession which may have been previously consigned by us to you.

Eleventh.—Upon your acceptance in writing of the terms and conditions of this agreement, you understand and agree that you will handle our cigarettes exclusively, on the terms and conditions herein specified, and, in the event that you hereafter determine to sell cigarettes of other manufacture, you are to notify us, in writing, of such determination ; and thereafter, if you have fully complied with all other terms of this agreement, the commissions to be paid to you for sale of our cigarettes shall be at the rate of two per cent (2 %).

Twelfth.—If you shall sell or distribute, or in any way, directly or indirectly, aid in the sale or distribution of any other cigarettes than those of our manufacture, without having first given us written notice of your intention so to do, as required by paragraph eleventh, you shall not be entitled to claim or receive any commissions not previously paid to you in excess of two per cent (2%) on any past or future sales under this agreement; and the right and option is hereby distinctly reserved to us to determine and declare that you have surrendered all right to be paid any commission over said rate of two per cent, if we shall be satisfied that you have, in any way, aided in the sale or distribution of cigarettes other than those manufactured by us.

Thirteenth.—We reserve the right of determining, at all times, as to the number of cigarettes and the brands which we will consign to you under this agreement, we

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to determine the matter before or after receiving requests or reports from you; and you expressly agree that you will promptly make reports, or account of all sales, to us, whenever, or as often as we may call for the same.

Fourteenth.—The right is reserved to us, at any time, to decline to consign to you any more cigarettes, and to withdraw the cigarettes already consigned to you, upon repaying to you all your legitimate advances thereon, and the right is reserved to you, at any time, to decline to act further for us, after having delivered to us all cigarettes then in your hands, and paying over to us the proceeds of all sales of our cigarettes at list price.

Fifteenth.—Requests for consignments, as well as all advances and reports of sales, must be made to our office in Montreal. Commissions will also be settled and paid from there.

Sixteenth.—No employee of this company has any authority whatever to change or modify this agreement, or any circular, letter or price list of this company.

Seventeenth.—This agreement shall take effect from the date hereof, and shall supersede all agreements as to our cigarettes then existing between you and the company.

Your agreement in writing hereon to receive our cigarettes on consignment, and to sell and account for the same, under the above terms and conditions, when executed by you, will constitute a binding contract between you and our company.

THE AMERICAN TOBACCO COMPANY OF CANADA, Limited.

By O. S. PERRAULT.

.....agree to receive cigarettes on consignment from The American Tobacco Company of Canada, Limited, and to sell the same, and account to said company therefor, upon the terms and conditions set forth in the foregoing written proposition to us. To the faithful performance of all of such terms and conditions we hereby agree and bind ourselves.

Dated.....1895.

(Sign here).....

In the presence of

Street and No.....

(Witness sign here).....

City or town.....

Province.....

The main features of this contract are :—

(a) The selling price is fixed by the manufacturer.

(b) A commission of 2% is allowed the consignee on the amount realized from the sale of the cigarettes consigned; these cigarettes under the agreement remaining the property of the American Tobacco Company of Canada until sold by the consignees.

(c) If the consignee handles the cigarettes of the American Tobacco Company exclusively, and complies with the terms and conditions of the agreement, an additional 6% is allowed in the way of commission to the consignee on the amount realized from the sale of the cigarettes.

This contract has been entered into between the American Tobacco Company of Canada, Limited, and most of the wholesale grocers and jobbers in cigarettes in Ontario, Quebec, Manitoba and the maritime provinces.

The cigarettes manufactured by the American Tobacco Company of Canada, Limited, acquired such a reputation in the trade generally that there was an almost

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universal demand for them in the retail trade, and the wholesale merchants and jobbers required to carry them in stock in order to supply this demand.

It was established that the commission of 2% is not sufficient to compensate the wholesale merchant or jobber for handling the cigarettes of the American Tobacco Company in Canada; that the extra 6% commission earned by handling their goods exclusively enables the merchant or jobber to make a good profit, the benefit of which is assured the merchant or jobber dealing with the company under the terms of the contract, and that in consequence most of the larger dealers in cigarettes have entered into the agreement with the American Tobacco Company to the exclusion of the sale by them of the cigarettes made by the other manufacturers. It was also established that wholesale merchants and jobbers are unable to purchase goods from the American Tobacco Company of Canada except under the terms of this contract.

The manufacture of cigarettes in Canada has increased from 106,493,180 in 1897 (when of this total the output of the American Tobacco Company was 86,008,500) to 137,284,934 in 1902, (when of this total the output of the American Tobacco Company was 109,437,550).

In 1901 the Empire Tobacco Company, manufacturers of tobacco out of Canadian leaf, introduced a form of contract somewhat similar in its effect to the contract already in use in the cigarette trade. The Empire Tobacco Company is under the same general management as the American Tobacco Company of Canada is, in fact, a branch of that concern, the former being engaged in the manufacture of cigarettes and the latter engaged in the manufacture of tobacco from Canadian grown leaf. The contract with the Empire Tobacco Company, Limited, is in the following terms :—

THE EMPIRE TOBACCO COMPANY (LIMITED).

MONTREAL, 1900.

We will be glad to sell our brands of tobaccos to you, upon the following terms and conditions, viz. :—

First.—All tobaccos which we may sell to you, you are to sell to the retail trade only for retail purposes ; you are to sell none to other than retail dealers except by our written permission.

Second.—You shall, at all times, sell our tobaccos at such prices only as we may fix in selling lists sent to you.

Third.—The cost of freight from our factories is to be paid by us.

Fourth.—If you handle no manufactured tobacco made from Canadian leaf, or made from a combination of Canadian and foreign leaf, excepting the brands made by us, and, if you, in all respects, fully comply with the terms and conditions of this agreement, we will pay you a rebate of 5 cents per pound.

Fifth.—Settlements and payments of rebates are to be made as follows :—Once every 30 days, commencing 60 days from the first day of the month, in which this agreement is put in force, provided such shipments have been paid for.

Sixth.—All obligations upon our part to pay you any rebate for the sale of our tobaccos, which we may sell you, are, and shall be, dependent upon your strict compliance with the agreements herein contained, and more especially that you will not sell any of our tobaccos for a less price or upon different terms than those fixed on our selling lists sent to you. If you should sell or dispose of any of our tobaccos at less than such price, or on different terms, you shall forfeit all right to the payment of any rebates on tobaccos which you have previously purchased, and on which rebates have not been paid you, such forfeiture to be determined and declared by us alone.

Seventh.—Payments for all tobaccos which we may sell to you are to be made by draft, 30 days net, from date of shipment.

Eighth.—This agreement can be terminated by either party, at any time, by giving written notice to that effect.

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Ninth.—No employee of this company has any authority whatever to change or modify this agreement, or any circular, letter or price list of this company.

Tenth.—This agreement shall take effect from the date hereof, and shall supersede all agreements regarding our tobaccos then existing between you and this company.

Your agreement in writing hereon to sell our tobaccos under the above terms and conditions, when executed by you, will constitute a binding contract between you and our company.

THE EMPIRE TOBACCO COMPANY, LIMITED,

By.....

President.

.....the undersigned, agree to sell the tobaccos made from Canadian, or a combination of Canadian and foreign leaf, of the Empire Tobacco Company, Limited, upon the terms and conditions set forth in the foregoing written proposition to us. To the faithful performance of all of such terms and conditions we hereby agree and bind ourselves.

Dated.....190 .

Signed.....

In the presence of.....

(Witness sign here).....

The main features of this contract are :—

(a) The selling price is fixed by the manufacturer.

(b) A rebate of 5 cents per pound is allowed to the purchaser if he handles no manufactured tobacco made from Canadian leaf or made from a combination of Canadian or foreign leaf other than that manufactured by the Empire Tobacco Company.

This contract differs from the cigarette contract in this, that the tobacco when sold becomes the property of the purchaser and is not forwarded on consignment as in the case of cigarettes.

It has been entered into by nearly all the leading wholesale grocers and jobbers in the province of Ontario, and by many of the merchants engaged in the same business in the province of Quebec.

The contract is not in force in the other provinces of the Dominion.

Under the terms of this agreement it does not pay the wholesale grocer or jobber to handle the goods of the Empire Tobacco Company except for the rebate of 5 cents per pound, which is earned only when their goods are dealt in to the exclusion of the tobacco manufactured by the independent manufacturers. With very few exceptions the wholesale merchants who appeared as witnesses before the Commission and who are parties to this contract are satisfied with its provisions.

As to the growers of Canadian leaf tobacco it would appear that they have as yet suffered no inconvenience from the contract system complained of, and have been at no disadvantage. Their crops of tobacco leaf have secured to them remunerative prices, and so far as they are concerned, tobacco growing is a paying industry. The apprehension does exist, however, among those engaged in the culture of tobacco, that if the present system should result in only one buyer of their product remaining in the field, the price would be regulated by that buyer, there being at present no export market for tobacco.

No evidence was adduced to show that as a result of this contract the price of tobacco was enhanced to the consumer, nor that the quality of the article was in any way deteriorated. On the contrary, it appeared that as a result of the conditions at

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present existing in the tobacco trade generally, and possibly owing to the competition existing between the Empire Tobacco Company and the other manufacturers of Canadian and combination leaf in Canada, the consumer gets fair value for his money.

Nor can it be said that the terms of these agreements are illegal. Doubtless their object is to obtain for the cigarettes and tobacco manufactured by the two companies such an exclusive and extensive sale as to render it unprofitable for others to engage in the same line of manufacturing, but the means employed under these contracts do not transgress any statutory enactment, nor are they contrary to the well settled rules of the common law in reference to trade competition.

A criminal charge was laid by Mr. J. M. Fortier against the American Tobacco Company in the city of Montreal, and also against Mortimer B. Davis *et al*, directors of the American Tobacco Company in the city of Quebec, for conspiracy in restraint of trade under Articles 216 and 520 of the Criminal Code. In the well considered judgments of the learned judges Chauveau of Quebec and Dugas of Montreal, it was held that the system of trade adopted by the defendants was not contrary to the provisions of the criminal law.

It is apparent that this contract system secures to the two companies certain advantages in their having exclusive facilities for the distribution of their manufactured products, or rather the exclusive enjoyment of facilities which should be common to all. It does to some extent prejudicially affect the other manufacturers of cigarettes and Canadian leaf tobacco in Canada, as it restricts the opportunities of the other manufacturers to reach the retail dealers and through them the consumers. The wholesale trade is the highway between the manufacturer and consumer, which practically all manufacturers are desirous of using. The manufacturers to whom this highway is not available have to secure other and more expensive channels to dispose of their goods at a reasonable profit. The manufacturer who is not able to avail himself of the wholesale trade distributing his goods is compelled to incur greater cost in distributing his goods to the retailer by the employment of a greater number of travellers and sales agents, the greater number of accounts which have to be kept, and the consequent increased clerical work; the larger number of collections which have to be made, and the greater risk of loss in connection with these accounts; and the increased cost of freight on small packages. The extra price at which he may be able to sell direct to the retailer as compared to that which he might obtain from the wholesale merchants, is not sufficient to reimburse him for the extra cost which he has to incur in being obliged to conduct his business in this way.

It did appear during the course of the inquiry, that trade contracts having in view somewhat similar objects as the contracts in question were in use in other lines of business. A consideration of the contracts would involve a very lengthy inquiry. All the parties interested would be entitled to notice of the proceedings, in order that they might have an opportunity to appear and explain the circumstances of each case and the conditions existing in the particular businesses affected.

Your Commissioner being of the opinion that an investigation of these contracts did not necessarily come within the scope of this inquiry, merely records the fact that such contracts do exist.

Your Commissioner made personal enquiries as to the working of the Statute of the Commonwealth of Massachusetts entitled 'An Act for the protection of traders,' referred to in the Order in Council hereinbefore mentioned, and which statute is in the following words :—

Section I.—No person, firm, corporation, or association of individuals doing business in this commonwealth, shall make it a condition of the sale of goods, wares or merchandise that the purchaser shall not sell or deal in the goods, wares or merchandise of any other person, firm, corporation or association of individuals : *Provided*, that nothing in this Act shall be construed to prohibit the appointment of agents or sole agents for the sale of, nor the making of contracts for the exclusive sale of goods, wares or merchandise.

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Section II.—Any person, firm, corporation, or association of individuals, or the agents of any such person, firm, corporation, or association of individuals, violating any provision of this Act, shall be punished for the first offence by fine of not less than fifty and not more than one hundred dollars ; and for each succeeding offence by fine of not less than one hundred and not more than five hundred dollars, or by imprisonment in the House of Correction for a term not exceeding one year, or by both such fine and imprisonment.

Section III.—This Act shall take effect thirty days after its passage.

(Acts of 1901, Chapter 478).

It appeared that in so far as could be ascertained no prosecutions had been undertaken under the provisions of this Act in the Commonwealth of Massachusetts, and the Appellate Court of that State had no opportunity to interpret its provisions.

Your Commissioner is of the opinion, that the terms of this law, even if adopted by the Parliament of Canada, would not afford to the petitioners the relief asked for.

[Your Commissioner finds, as the result of the inquiry :

(1) That the contract system complained of by the petitioners does in fact exist and is in general use in the cigarette and tobacco trade in Canada.

(2) That the provisions of the contracts in question are not illegal, either under the common law or under any statutory law heretofore enacted by the Parliament of Canada.

(3) That the manufacturers of cigarettes and of Canadian tobacco other than the American and Empire Tobacco Companies are at a disadvantage in the distribution of their goods, and in the prosecution of their business generally, by reason of such contract system.

The extent to which legislative control over the freedom of contract should be exercised, and how far the rules of the trade can be interfered with by statutory enactments, without injury to the public interest, are, in the opinion of your Commissioner, questions of policy for the consideration of Parliament.]

All of which is respectfully submitted.

D. B. McTAVISH,

Commissioner.

OTTAWA, April 6, 1903.